APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 22, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-3597 and 98-3622

RONALD ALEXANDER; FAYE ALEXANDER;
FAIR HOUSING PARTNERSHIP OF
GREATER PITTSBURGH, INC.,

Appellants in No. 98-3597

v.

JOSEPH RIGA; MARIA A. RIGA a/k/a Carla Agnotti

RONALD ALEXANDER; FAYE ALEXANDER;
FAIR HOUSING PARTNERSHIP OF
GREATER PITTSBURGH, INC.,

v.

JOSEPH RIGA; MARIA A. RIGA a/k/a Carla Agnotti

JOSEPH RIGA and MARIA A. RIGA,

Appellants in No. 98-3622

Appeal from the United States District Court
for the Western District of Pennsylvania
(D. C. Civ. No. 96-cv-00049)
District Judge: Honorable William L. Standish

Appendix A

Argued
October 18, 1999

Before: SLOVITER, MANSMANN and ROTH,
Circuit Judges.

(Filed March 22, 2000)

* * *

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

The present case arises essentially as an appeal by the plaintiffs Ronald and Faye Alexander ("the Alexanders") and the Fair Housing Partnership of Greater Pittsburgh, Inc. ("the FHP") from a judgment entered in the United States District Court for the Western District of Pennsylvania.[1] The Alexanders and the FHP brought suit against Joseph and Maria Riga ("the Rigas"), the owners of the building in the Squirrel Hill neighborhood of Pittsburgh in which the Alexanders sought to rent an apartment. In their suit, the Alexanders and the FHP alleged racial discrimination in the rental of housing pursuant to the Fair Housing Act of 1968, as amended, 42 U.S.C. § 3601 et seq., and the Civil Rights Act of 1866, as amended, 42 U.S.C. §§ 1981 and 1982. In their complaint, the Alexanders and the FHP sought damages, as well as equitable and injunctive relief.

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1. The Rigas, in a cross-appeal, assert that the District Court erred in denying them summary judgment, in excluding evidence, and in denying them costs.

Appendix A

Following an eight-day trial in the District Court, the jury found, on special verdicts, that Mrs. Riga had violated the Fair Housing Act when she denied rental housing to the Alexanders based upon race. Nonetheless, the jury found Mrs. Riga's conduct was not "a legal cause of harm" to the Alexanders and did not award damages. The jury found that Mrs. Riga's conduct was "a legal cause of harm" to the FHP, but, likewise, did not award damages. Thus, the District Court declined to submit to the jury the issue of punitive damages, which had been bifurcated from the liability portion of the case. Following post-trial motions, the District Court entered judgment in favor of the Rigas (the defendants) and the FHP, and against the Alexanders, and directed the parties to bear their own costs.

On appeal, the Alexanders (the plaintiffs), supported by the NAACP Legal Defense & Educational Fund and the United States Department of Justice as amici curiae, raise a host of issues related principally to the jury instructions and the conduct of the trial. We have jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291.

Because we find that in a case alleging discrimination under the Fair Housing Act the discrimination itself is the harm, we will reverse the decision of the District Court granting judgment to the Rigas as against the Alexanders and the decision declining to submit the question of punitive damages to the jury. We will direct the District Court on remand to enter judgment for the Alexanders and to hold a new trial to present to a jury the question of punitive damages, as against both Mr. and Mrs. Riga.

Appendix A

I.

From September 17, 1995, through October 8, 1995, on ten separate occasions, Ronald and/or Faye Alexander, an African-American couple, inquired about an apartment at 5839 Darlington Road, Squirrel Hill, which had been advertised in a September 17 newspaper. Joseph and Maria Riga owned the building, which Mrs. Riga managed. Mrs. Riga falsely told the Alexanders that the apartment was unavailable and the Alexanders were denied a view. Their phone calls to inquire about the apartment were not returned. Daria Mitchell, an African-American "tester" for the FHP, was falsely told that the apartment had been rented, and thereafter, Mrs. Riga refused to return Mitchell's calls.

In contrast, from September 18 through October 9, 1995, on ten separate occasions, Mrs. Riga truthfully told Dennis Orvosh, a white tester for the FHP, and whites Robin McDonough, Jeff Lang, and Heidi Sestrich, that the apartment was available, allowed each a view, and returned their phone calls.

On January 11, 1996, the Alexanders and the FHP filed this civil action against the Rigas. In their complaint, the plaintiffs sought damages, as well as equitable and injunctive relief, for alleged race discrimination. Specifically, the plaintiffs alleged that the Rigas discriminated against the individual plaintiffs on the basis of their race in violation of the Fair Housing Act in connection with the attempts of Mr. and Mrs. Alexander to view a rental property owned by the Rigas in Squirrel Hill. The Fair Housing Act prohibits discrimination in the sale or rental of housing, including the

refusal to negotiate for the rental of, or otherwise make unavailable or deny, a dwelling to any person because of race; to discriminate against any person in the terms, conditions or privileges of rental of a dwelling because of race; or to represent to any person because of race that any dwelling is not available for inspection, sale or rental when such dwelling is, in fact, available. *See* 42 U.S.C. §§ 3604(a), (b) and (d). The plaintiffs sought equitable relief including an order requiring the posting of fair housing notices and a cease and desist order prohibiting the Rigas from discriminating on the basis of race.

Following an eight-day trial in May, 1998, a jury returned eight special verdicts. The jury found that Mrs. Riga had discriminated against the Alexanders in violation of the Fair Housing Act. Nonetheless, the jury found that the discriminatory conduct of Mrs. Riga was not "a legal cause of harm" to either Mr. or Mrs. Alexander, and declined to award them monetary damages.[2] As to the FHP, the jury found that the discriminatory conduct of Mrs. Riga was "a legal cause of harm" to the FHP, however, here, too, the jury declined to award monetary damages. The issue of punitive damages had been bifurcated from the issues of liability and compensatory and/or nominal damages. After the return of the jury's special verdicts, the court declined to submit the issue of punitive damages to the jury. Based on

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2. Although both Mr. and Mrs. Riga were defendants at trial, the special verdicts that were submitted to the jury were limited to determining Mrs. Riga's liability for discriminatory conduct. The District Court concluded, mistakenly, as discussed *infra*, that only Mrs. Riga was involved in the events leading to this lawsuit because Mr. Riga was in Italy at all relevant times.

the special verdicts, the District Court entered judgment in favor of the Rigas and against the plaintiffs, together with costs, on May 26, 1988.

On May 28, 1998, the plaintiffs filed four post-trial motions: (1) to enter a judgment notwithstanding the verdict, to issue an additur of nominal damages in the amount of one dollar for each plaintiff, or to grant a new trial on damages, or in the alternative, award punitive damages as a matter of law against both Mr. and Mrs. Riga; (2) for a hearing on injunctive relief; (3) for attorney's fees, costs and expenses; and (4) to grant the plaintiffs judgment as a matter of law. The Rigas moved to tax costs against the plaintiffs.

On October 13, 1998, the District Court denied the plaintiffs' motions except for the FHP's motion to have judgment entered in its favor, denied the Rigas' motion to tax costs, and entered judgment. The plaintiffs filed a timely notice of appeal on November 5, 1998. The Rigas also filed a timely cross-appeal.

On appeal, the plaintiffs put forth several major contentions. They assert that the District Court should have entered judgment for them because the jury charges presented an incorrect legal standard with respect to liability. The plaintiffs further maintain that the District Court presented an incorrect legal standard with respect to nominal damages and erred in refusing to submit the issue of punitive damages to the jury after the jury found that Mrs. Riga had discriminated on the basis of race in violation of the Fair Housing Act but awarded neither compensatory nor nominal damages. The plaintiffs argue, too, that both Mr. and Mrs.

Riga should be subjected to punitive damages, because, although Mr. Riga was out of the country at this time, he violated a nondelegable duty not to discriminate under the Fair Housing Act.

II.

The Fair Housing Act was intended by Congress to have "broad remedial intent." *Havens Realty v. Coleman*, 455 U.S. 363, 380 (1982). As this case stands after trial, the net result of the plaintiffs' victory was that they were out-of-pocket for the expenses of litigation. Historically, enforcement of the civil rights statutes depends, in large measure, on the willingness of private plaintiffs to pursue individual cases. The Supreme Court has attached importance to each individual's prosecution of discrimination under the statutes:

> the objectives of the [discrimination statutes] are furthered when even a single [individual] establishes that [another individual] has discriminated against him or her. The disclosure through litigation of incidents and practices that violate national policies respecting nondiscrimination . . . is itself important.

McKennon v. Nashville Banner Pub., 513 U.S. 352, 358-59 (1992). And, with respect to the Fair Housing Act in particular, the Supreme Court has held that

> since the enormity of the task of assuring fair housing makes the role of the [United States] Attorney General in the matter minimal, the main

> generating force must be private suits in which . . . the complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."

Trafficante v. Metropolitan Life Ins., 409 U.S. 205, 211 (1972).

III.

A. The Alleged Errors in the Jury Instructions

The Alexanders argue on appeal that, after the jury's verdict that the Fair Housing Act was violated, the District Court was required to enter judgment in favor of them and the FHP.[3] All plaintiffs allege on appeal primarily two flaws in the District Court's jury instructions. The plaintiffs specifically argue that the District Court erred: (1) in requiring that the jury find "legal causation" for "harm" as a prerequisite to finding liability under the Fair Housing Act, and (2) in requiring that the jury find "insubstantial" actual damages or "legal harm" as a prerequisite to awarding nominal damages.

Unfortunately, a party who has not challenged the trial court's jury instructions at an appropriate time is deemed to have waived such a challenge. We have emphasized the need to raise any objections to jury instructions prior to the time the jury begins its deliberations:

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3. Ultimately, the District Court did grant judgment in the FHP's favor, but did not award any damages.

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> Under Fed. R. Civ. P. 51, a party, in order to preserve an objection either to a failure to instruct the jury on an issue or to the manner in which the jury was instructed, clearly must "object[ ] thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." *See also*, *McAdam v. Dean Witter Reynolds*, 896 F.2d 750, 759 (3d Cir. 1990) (declining to consider newly developed argument concerning jury charge deficiency where party "failed to specifically and clearly object to either the charge or the entry of a judgment . . . based on this charge"); *Waldorf v. Shuta*, 896 F.2d 723, 739-40 (3d Cir. 1990) (holding that objection, because sufficiently specific, had preserved error alleged on appeal).

Simmons v. Philadelphia, 947 F.2d 1042, 1078 (3d Cir. 1990), *cert. denied*, 503 U.S. 985 (1992). Generally, a party who does not clearly and specifically object to a charge he believes to be erroneous waives the issue on appeal. *Id.*

If the party claiming error in the jury instructions did not make a timely objection, we review for plain error and we will reverse only if the trial court committed error that was fundamental and highly prejudicial, such that the instructions failed to provide the jury with adequate guidance, and the District Court's refusal to consider the issue would result in a miscarriage of justice. *Cooper Distrib'g v. Amana Refrig.*, 180 F.3d 542, 549-550 (3d Cir. 1999). Fed. R. Civ. P. 51. We have characterized plain error review in the absence of a "timely and specific objection," as "a form of

discretionary review that we have exercised sparingly . . . ." *Id.*, *see also Bowley v. Stotler*, 751 F.2d 641, 652 (3d Cir. 1985); *see also United States v. 564.54 Acres of Land*, 576 F.2d 983, 987 (3d Cir. 1978) (under plain error doctrine, court may review jury instruction if error is "fundamental and highly prejudicial" and failure to consider it "would result in a miscarriage of justice"), *rev'd on other grounds*, 441 U.S. 506 (1979).

In short, our discretion to conduct a review under the plain error doctrine is limited to cases where the error is (1) fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and (2) our failure to consider the error would result in a miscarriage of justice. *564.54 Acres of Land* at 576 F.2d at 987-988. Consistent with our belief that this discretionary power should be exercised sparingly, we will review the purported deficiencies in the jury instructions to determine whether they have been properly preserved and constitute grounds either for reversing the District Court's decision or for a new trial. The issue of whether a jury instruction misstates the proper legal standard is subject to plenary review. *Hopp v. Pittsburgh*, 194 F.3d 434, 440 (3d Cir. 1999).

1. The Alleged Error on Liability

The plaintiffs assert that the District Court's liability instruction was inaccurate and misleading and might have caused the jury not to award any damages despite their finding of a Fair Housing Act violation. Though the jury found that Mrs. Riga had discriminated against the

Alexanders, the jury found that there was no liability. The Alexanders did not receive a liability verdict because they were unable to prove "causation." On the other hand, the FHP did receive a liability verdict; the jury found that there was "legal cause" as to the FHP caused by Mrs. Riga's discriminatory acts.

This is a statutory form of action. The Fair Housing Act provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach."[4] 42 U.S.C. § 3613(a)(1)(a). The Fair Housing Act defines "discriminatory housing practice," in pertinent part, as follows:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for

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4. The FHP, a fair housing organization, is an "aggrieved person" under the statute and is entitled to obtain relief, including punitive damages. *See Havens Realty*, 455 U.S. at 379 (1982); *See also Growth Horizons v. Delaware County*, 983 F.2d 1277, 1281-82 (3rd Cir. 1993); *See also Hope, Inc. v. DuPage County*, 717 F.2d 1061, 1074 (7th Cir. 1983). On appeal, the Rigas have challenged the FHP's standing in this case. We note that the Supreme Court has held that a fair housing organization had standing to sue if the discriminatory acts impaired the organization's ability to carry out its mission. *Havens Realty*, 455 U.S. at 378-379. Here, the FHP staff "stopped everything else" and devoted all attention to this case. It, moreover, diverted resources to investigate and to counter the Rigas' conduct.

> the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
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> * * *
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> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. § 3604.[5] The plain language of the Fair Housing Act thus permits an individual to obtain relief for the discriminatory housing practice or breach. A prospective tenant must prove only that a landlord did one of the unlawful acts listed in section 3604 with respect to the prospective tenant's attempt to obtain housing. If an individual proves discrimination, he or she need not prove anything else. The District Court imposed upon the statute another requirement, "legal causation." The Rigas argue that the discrimination is the "legal cause" for the "harm," which itself must be proved. To the contrary, the "harm" is the discrimination.

The Alexanders felt themselves to be the victims of housing discrimination and sued the Rigas under the Fair Housing Act, both to vindicate their unlawful treatment and the public interest in fair housing. One "unlawful act" of several which falls under the ambit of section 3604 is that

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5. In conjunction with the Fair Housing Act "Definitions" at 42 U.S.C. § 3602.

the Alexanders were told that the apartment was not available, when it was. The statute directly focuses on that situation, seeks to deter it, and seeks to remedy it. At trial, the Alexanders related what transpired during their housing search and also described additional adverse consequences, such as emotional distress, for which they sought compensatory damages. Although the jury declined to award compensatory damages for any adverse consequences flowing from the discrimination, the jury believed that the Alexanders were indeed victims of illegal discrimination.

We conclude that the District Court misstated the proper legal standard in this Fair Housing Act case by requiring "legal causation" beyond a showing of illegal discrimination. Nonetheless, we find that the plaintiffs did not make a timely objection to the jury charge on this issue and have so waived it. The plaintiffs did not object to this requirement of "legal causation" at the close of the jury instructions. Moreover, the attorneys for both plaintiffs had previously participated in a charge conference in which they met with the judge and agreed upon instructions.

Under a plain error analysis, unquestionably, the instructions requiring "legal causation" failed to provide the jury with adequate guidance as to compensatory damages.[6]

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6. The Rigas urge that our holding in *Gunby v. Pennsylvania Elec.*, 840 F.2d 1108, 1121-1122 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) mandates that, to determine liability in a Fair Housing Act case, a jury find "causation" linked to "actual injury." *Gunby* is inapplicable here. In *Gunby*, the plaintiff did not present evidence that he suffered any emotional distress as a result of the loss of the sought-after job. Thus, we set aside the jury's award of

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See Tyus v. Urban Search Management, 102 F.3d 256, 265 (7th Cir. 1996) (instruction "confusing" where jury charged that one element of a Fair Housing Act violation is proof that the discriminatory housing practice caused "actual injury"), *cert. denied*, 520 U.S. 1251 (1997). The second criterion for plain error, however, is that our refusal to consider the issue would result in a miscarriage of justice.

The plaintiffs have conceded that they did not make a claim for substantial compensatory damages. Further, we cannot say, in light of our decision taken as a whole, which should afford substantial relief to the plaintiffs, *see B. The Assignment of Judgment, infra*, that our refusal to consider the issue of compensatory damages would result in a miscarriage of justice.

2. The Alleged Error on Nominal Damages

The plaintiffs further argue that the jury was improperly instructed and that the jury committed error when it failed to return an award of $1 in nominal damages for Mrs. Riga's violation of the Fair Housing Act. The plaintiffs allege that the District Court erred in instructing the jury that an award of nominal damages requires a finding of "insubstantial" actual damages, or of "legal harm."[7] Rather, the plaintiffs

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compensatory damages for emotional distress, holding that emotional distress cannot be presumed and that speculative damages are not to be awarded.

7. Notably, plaintiffs did object after the jury charge to the District Court's special verdict questions charging that the jury find "legal harm" and "legal cause" and proposed that the special verdict ask only whether "harm" was caused. The District Court refused, stating, ". . . My instructions are clear."

contend that nominal damages should be awarded where the jury has found a federal civil rights violation, particularly the "fundamental" right to fair housing. Thus, the jury should have been instructed that it was required to find nominal damages if it found, as it did, that housing discrimination had occurred and the jury should have acted in conformity with that instruction and awarded the plaintiffs these damages.

The District Court apparently felt that this case involved "merely" a violation of "purely statutory rights," and that, therefore, nominal damages were not required. In our opinion, this stance trivializes the role of civil rights law in eradicating discrimination. Racial discrimination, according to the Supreme Court, is a "fundamental injury to the individual rights of a person," *Goodman v. Lukens Steel*, 482 U.S. 656, 661 (1987), and the inability to buy or lease real property can be considered one of the badges and incidents of slavery. *See also The Civil Rights Cases*, 109 U.S. 3, 22-23 (1883). Indeed, even absent proof of actual injury, nominal damages are to be awarded to recognize violation of a constitutional right. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978).

This entitlement is not automatic, however, "but rather, it is incumbent upon the plaintiff to make a timely request for nominal damages." *Campos-Orrego v. Rivera*, 175 F.3d 89 (1st Cir. 1999). In this instance, the plaintiffs requested and received an instruction on nominal damages, but failed to bring to the District Court's attention their contention that the jury should have been instructed that nominal damages are mandatory with a finding of discrimination. The plaintiffs

neglected to bring this matter to the attention of the trial judge prior to the time the jury retired to consider its verdict, much less the specific grounds upon which it was based. In an attempt to avoid a holding that this failure to object to the jury instructions waived their right to challenge the jury's nominal damages verdict on appeal, the plaintiffs argue that the District Court's failure here was plain error.

Without deciding the question, we find that even if the jury were without adequate guidance on the question of whether nominal damages are mandatory or discretionary for violation of a federal statute, failure to rectify this error under the specific circumstances of this case does not result in a miscarriage of justice. In the final analysis, given our holding in this case, the plaintiffs are the prevailing parties, have the opportunity to recover punitive damages, and might each only receive $1 less in compensation than that to which it might be entitled. *See 564.4 Acres of Land*, 576 F.2d at 988 (failure to rectify error could result in miscarriage of justice because one party could receive *several million dollars* less in compensation than that to which it was entitled). Thus, we hold that the plaintiffs' failure to challenge the jury instruction dealing with nominal damages waived their right to raise this question on appeal.

B. The Assignment of Judgment

On a crucial and related matter, we find that because the jury found that the Fair Housing Act was violated, the District Court was required, as a matter of law, to enter judgment for both the Alexanders and the FHP. The District Court's refusal to enter judgment for the Alexanders constitutes an abuse of

discretion, and we will reverse.[8] Similarly, the District Court abused its discretion in failing to find that both the Alexanders and the FHP were "prevailing parties" and entitled to costs under 42 U.S.C. § 3613(c)(2). *See New Jersey Coalition of Rooming & Boarding House Owners v. Mayor of Asbury Park*, 152 F.3d 217, 225 (3d Cir. 1998) (the Fair Housing Act's costs "provision, which sounds fully discretionary . . . — 'the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs' — actually is not. In fact, a district court's discretion not to grant attorney's fees and costs in civil rights cases is tightly cabined.") We therefore hold that both the Alexanders and the FHP were prevailing parties and will direct the District Court to award them attorneys' fees and costs on remand.

C. Punitive Damages

1. Conduct Calling for Punitive Damages

In this case, the District Court declined to send the issue of punitive damages to the jury. One main reason for this appears to have been that because the jury awarded no actual

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8. Without deciding the waiver issue as to declaratory relief for the Alexanders, on this one point regarding final judgment, we are satisfied that even were there a waiver, the matter would be one of plain error. Entering judgment for the party found by the jury to have violated the Fair Housing Act, rather than for the victims who had been discriminated against, is a paradigmatic "miscarriage of justice." And, further, this improper assignment of judgment led to sequelae which are anathema to public policy, such as denial of costs to the victims for successfully proving a Fair Housing Act violation.

damages to either plaintiff, the District Court concluded that Mrs. Riga was not liable to the Alexanders. Because so much of the Rigas' brief was devoted to this issue, though later they conceded the point, it bears mentioning that beyond a doubt, punitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages. *See Curtis v. Loether*, 415 U.S. 189 (1974) (punitive damages appropriate for Title VIII violation without award for actual loss, remanding for jury trial on punitive damages amount), *see also Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965) (punitive damages appropriate in section 1983 case absent award of compensatory damages).

We have sufficiently resolved this matter in our foregoing discussion on the jury charge regarding liability, and in our conclusion that a Fair Housing Act violation is all that is needed to establish liability. Another reason the District Court declined to send the issue of punitive damages to the jury is that the District Court concluded that the jury apparently did not believe Mrs. Riga's conduct to have resulted from the type of evil motive thought necessary to award punitive damages. We will address this second point.

Whether there is sufficient evidence to support a punitive damages award is a question of law which we review de novo. *Delli Santi v. CNA Ins.*, 88 F.3d 192, 207 (3d Cir. 1996), *Bonjorno v. Kaiser Aluminum & Chem.*, 752 F.2d 802, 814-15 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).

Here, there is a specific damages provision in the plain language of the statute. 42 U.S.C. § 3613(c) provides the

relief which may be granted, when, as here, private individuals seek to enforce the Fair Housing Act:

> (1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred . . . , the court may award to the plaintiff actual and punitive damages, and . . . may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).
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> (2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

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The District Court has the duty to "give effect, if possible, to every clause and word of [the] statute." *Bennett v. Spear*, 520 U.S. 54 (1997).

The standard for punitive damages in a federal civil rights action was set by the Supreme Court, and does not require "outrageousness": a jury may "assess punitive damages in [a civil rights action] when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

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In denying the Alexanders' request to submit the punitive damages issue to the jury, the District Court found that punitive damages were precluded because the jury's refusal to award damages showed that the jury, in the District Court's words, "did not consider the conduct of Mrs. Riga to have been the result of an evil motive or intent or to have involved reckless or callous indifference to the federally protected rights of others." In the District Court's view, it thus "would be inappropriate to permit the jury to award punitive damages to them." The District Court also held that more than intentional discrimination is required for the jury to enter punitive damages — that "outrageous conduct on the part of Mrs. Riga beyond that which may attach to any finding of intentional discrimination" was required.

"Malice" and "reckless indifference," in this context, however, refer not to the egregiousness of the landlord's conduct, but rather to the landlord's knowledge that it may be acting in violation of federal law. *See Kolstad v. American Dental Association*, 527 U.S. 526, __, 119 S.Ct. 2118, 2124 (1999). In *Kolstad*, a female employee sued her employer under Title VII, asserting that the employer's decision to promote a male employee over her was a proscribed act of gender discrimination. The District Court denied the employee's request for a jury instruction on punitive damages. The Court of Appeals affirmed, holding that, before the jury can be instructed on punitive damages, the evidence must demonstrate that the defendant has engaged in some "egregious" misconduct; under the facts of that case, the female employee had failed to make the requisite showing. The Supreme Court vacated the earlier decision and remanded. In so doing, the Supreme Court explicitly rejected

the conclusion that "eligibility for punitive damages can only be described in terms of [a defendant's] 'egregious' misconduct." Rather, the Supreme Court held that "[t]he terms 'malice' and 'reckless' ultimately focus on the actor's state of mind," making a showing of egregious or outrageous discrimination unnecessary. *Id.* Applied to the case before us, we hold that because the jury's finding of a violation under the Fair Housing Act necessarily encompasses a finding of intentional discrimination, the plaintiffs need not also demonstrate that the conduct was particularly egregious or malicious in order to obtain punitive damages.

Indeed, recklessness and malice may be inferred when a manager responsible for showing and renting apartments repeatedly refuses to deal with African-Americans about the apartment, and misrepresents the apartment's availability. *See Miller v. Apartments & Homes*, 646 F.2d 101 (3d Cir. 1981) (punitive damages appropriate where defendant acts with reckless disregard as to whether he is violating a federally protected right, or consciously and deliberately disregards consequences of actions), *see also Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982) ("wilful and gross" violation of the Fair Housing Act supported punitive damages where landlord evicted tenants for having African-American guests; on remand, trial court directed to assess punitive damages).

In the case before us, the jury returned special verdicts finding the rights of the Alexanders and the FHP testers under the Fair Housing Act to have been violated. The Alexanders and the FHP presented evidence that Mrs. Riga persistently refused to deal with African-Americans, as opposed to

whites, and represented that an apartment was not available for inspection or rental, when it was. The Alexanders described in saddening detail the deceptions to which they were subjected, and the consequent mortification they suffered. Mrs. Riga told them that "they had just missed" the apartment listed in an advertisement on Sunday, the day before. When the same advertisement appeared the following Sunday, Mr. Alexander asked a friend to call. The friend was told that the apartment was available. Using a different name, Mr. Alexander arranged to see the apartment and called twice to confirm the appointment. When he met Mrs. Riga at the building, she falsely stated that she had forgotten her keys, and could not show him the apartment, as her hand covered up her keys. Mr. Alexander "couldn't believe it, it made him angry," he thought she was lying. When he asked to reschedule, Mrs. Riga said that he could call her. He was feeling "a little bit too sick to say anything else . . . ." He walked away, then turned and saw her entering the building. He called to reschedule and left messages, but did not receive a responding telephone call from Mrs. Riga. After this, Mr. Alexander sought the assistance of the FHP, which directed testers to seek the apartment. In short, the white testers were granted access while the African-Americans testers were denied access. Mr. Alexander continued to try to contact Mrs. Riga and also had friends call. To one friend he remarked that he felt "hurt and discouraged, it is sort of degrading, it discourages you from trying . . . to find a place for your family to live, it is just sickening, I really can't describe it. It is terrible . . . ."

The Supreme Court in *Kolstad* did observe that the mere existence of a civil rights violation is not a guarantee of eligibility for punitive damages because a defendant might

not be aware of the federal law he or she violated or he or she might have honestly believed that the discrimination was permissible. *Kolstad*, 119 S. Ct. at 2125. These exceptions, however, do not apply to the Rigas in this case. Here, there is not any suggestion that Mrs. Riga did not know that it was illegal, and had been for thirty years, to discriminate on the basis of race in housing. The jury concluded that Mrs. Riga refused to deal with African-Americans with respect to the apartment building and was motivated by race. The plaintiffs have adduced sufficient evidence to demonstrate "reckless or callous indifference" to federally protected rights and to permit the jury to award punitive damages.

2. *Mr. Riga's Liability for Punitive Damages*

Although both Mr. and Mrs. Riga were defendants at trial, the special verdicts that were submitted to the jury were limited to determining Mrs. Riga's liability for discriminatory conduct. The District Court concluded that only Mrs. Riga was involved in the events leading to this lawsuit because Mr. Riga was in Italy at all relevant times. The Rigas assert that excluding Mr. Riga from the punitive damages discussion was appropriate because he neither had the requisite personal involvement nor did he acquiesce in Mrs. Riga's discriminatory conduct. The plaintiffs argue that both Mr. and Mrs. Riga should be subject to punitive damages, because, though Mr. Riga was out of the country at the relevant time, he violated a nondelegable duty not to discriminate under the Fair Housing Act.

Of course, a principal is directly liable where he himself commits, authorizes, or ratifies discriminatory treatment, *see Miller*, 646 F.2d at 111 ($25,000 punitive damages award

against principal for agent's action, where principal was involved in wrongdoing or authorized, ratified, or fostered agent's discriminatory acts); *see also Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989) (owner of management company and agent who refused to rent both liable; punitive damages against owner sustained). We now must decide, as a matter of first impression, whether a principal is vicariously liable for punitive damages for violations of the Fair Housing Act by the discriminatory acts of his managerial agent.

The Rigas contend that Mrs. Riga's conduct cannot be attributed to Mr. Riga. They are mistaken. Mr. Riga could not insulate himself from liability for discrimination in regard to an apartment building owned jointly by him and his wife and managed for their joint benefit, merely by relinquishing the responsibility for preventing discrimination to Mrs. Riga, his managerial agent. To effectuate the Fair Housing Act's mandate, both Mr. and Mrs. Riga are held responsible for Mrs. Riga's discriminatory practices. Here we adopt the general rule applied by other federal courts that the duty of a landlord under the Fair Housing Act not to discriminate in the leasing of property may not be delegated to the landlord's employee. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C. § 3601 et seq. *See Walker v. Crigler*, 976 F.2d 900, 904 & n. 5 (4th Cir. 1992) ("the duty of a property owner not to discriminate in the leasing or sale of that property is non-delegable"), *see also Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974) ("The discriminatory conduct of an apartment manager or rental agent is, as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable."), *Coates v.*

Bechtel, 811 F.2d 1045, 1051 (7th Cir. 1987); *Phiffer v. Proud Parrot Motor Hotel*, 648 F.2d 548, 552 (9th Cir. 1980); *Saunders v. General Services*, 659 F.Supp. 1042, 1059 (E.D.Va. 1987) ("Under the Fair Housing Act, a corporation and its officers 'are responsible for the acts of a subordinate employee . . . even though these acts were neither directed nor authorized . . . .' Courts have followed this rule even where 'it seems harsh to punish innocent and well-intentioned employers' because the statutory duty not to discriminate is non-delegable") (citations omitted).

On policy grounds, in *Kolstad* the Supreme Court arguably modified one aspect of this general rule, which could produce the harsh result that even a landlord who had made every effort to prevent discrimination could nevertheless be subject to punitive damages. *Kolstad*, 119 S. Ct. at 2128. *Cf. Walker*, 976 F.2d at 904-905 (property owner liable for the conduct of employees despite instructions to them not to discriminate). Recognizing civil rights law as an effort to promote prevention as well as remediation and observing the principles underlying the Restatement's limits on vicarious liability for punitive damages,[9] the Supreme Court held that, "in the punitive

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9. The Restatement (Second) of Agency, among other things, authorizes punitive damages "against a . . . principal because of an [agent's] act . . . if . . . the agent was employed in a managerial capacity and was acting in the scope of employment," and affirms that even intentional, specifically forbidden torts are within this scope if the conduct is "the kind [the employee] is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated, at least in part, by a purpose to serve" the employer. Restatement (Second) of Agency §§ 217 C(c), 228(1), 230, cmt. b. (1958).

damages context, an employer could not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with [civil rights laws].' " *Kolstad*, 119 S.Ct. at 2118, 2121, 2128. The Supreme Court continued that "[g]iving punitive damages protection to employers who make good-faith efforts to prevent discrimination ... accomplishes [the civil rights laws'] objective of 'motivat[ing] employers to detect and deter [civil rights] violations.' " *Id.* (internal citations omitted).

We conclude, therefore, that the issue of Mr. Riga's liability should be submitted to the jury. While Mr. Riga may have been abroad at the time of the suit, he apparently left Mrs. Riga in charge of the apartment building with authority to act on behalf of the two of them as a couple. At this juncture, we do not know if Mr. Riga made "good faith efforts to prevent discrimination," defined to an extent by the Supreme Court as efforts to "deter and detect [civil rights] violations" and to "enforce an anti-discrimination policy." *Id.* at 2129-2130. We leave to the jury on remand to determine whether Mr. Riga engaged in active anti-discrimination efforts sufficient to protect him from the impact of the general rule that he may not delegate to Mrs. Riga the duty not to discriminate.

D. Injunctive Relief

On appeal, the plaintiffs also argue that because the jury returned special verdicts finding that Mrs. Riga had violated the Fair Housing Act through a continuing course of refusal to deal with African-Americans, the District Court should

have granted injunctive relief, not only to safeguard the rights of these plaintiffs, but also on a policy level to safeguard free access to housing. The District Court denied the plaintiffs' request to present evidence on the need for injunctive relief, asserting that the plaintiffs had waived the request, because, although it had been a significant portion of the complaint and pretrial statement, the plaintiffs had not repeated the request until six days after the jury trial. The District Court also found that even had the plaintiffs not waived the request, there was no need for injunctive relief because there was not any evidence of a continuing or recurrent violation.

The Rigas suggest that the plaintiffs sought injunctive relief primarily to allow them to recover their attorneys' fees, but stated the issue as, "whether [within the court's discretion] declaratory and injunctive relief is necessary." Of course, the Rigas assert that this Court should defer to the District Court's judgment that it was unnecessary; evidence had been presented that the Rigas had rented apartments to African-Americans since the events of the Alexanders' lawsuit. Were we to examine the issue of injunctive relief on the merits, we would accord the District Court substantial deference on this matter, under the applicable abuse of discretion standard. *Marco v. Accent Publ'g*, 969 F.2d 1547, 1548 (3d Cir. 1992) (denial of injunctive relief reviewed for abuse of discretion, which occurs if the District Court's decision rests on a clearly erroneous finding of fact, an error of law, or a misapplication of law to the facts). This deference is not absolute, however, and we would need to be mindful that deterrence and prevention of future discrimination, one of the central

purposes of the civil rights statutes, *McKennon*, 513 U.S. at 358, might require the entry of injunctive relief. We are troubled to an extent by the District Court's rationale, which might permit the Rigas and other civil rights defendants to discriminate and stop when caught, in enough time to "obviate" the need for a court to issue injunctive relief.

Regardless of the interesting nature of this issue, however, we will hold, as did the District Court, that the issue has been waived. Here, six days elapsed from the time the jury's verdicts were returned and the jury was discharged, until the plaintiffs requested a hearing on injunctive relief. Though the District Court conceded that the plaintiffs had requested this relief in their complaint and pretrial statements, "at no time during the pretrial conferences with the court, or during the trial itself, did plaintiffs' attorneys refer to their requests for injunctive and equitable relief." We agree with the District Court that the issue is waived by the failure of counsel to raise the issue of injunctive relief prior to the conclusion of trial. In addition, through the remand we direct in this opinion, we are satisfied that, to some extent, the policy goal of deterring future discrimination will be effected.

E. Evidentiary Matters

In light of our decision, the remainder of the issues raised by both parties are either mooted or left to reconsideration on the limited remand we now grant. We comment here only briefly on two remaining evidentiary matters: (1) the plaintiffs' claim that the District Court abused its discretion by excluding evidence of the Rigas' discrimination against other African-Americans, and (2) the Rigas' claim on

cross-appeal that the District Court abused its discretion by excluding evidence of the Alexanders' lack of creditworthiness and lack of credibility. We find that in neither instance did the District Court abuse its discretion.

The plaintiffs maintain that the District Court erred in excluding probative evidence of the Rigas' ongoing pattern of discrimination in the form of an eyewitness, Steven Denson, who allegedly observed Mrs. Riga discriminating against other African-American applicants. The plaintiffs state that the witness' address was only discovered during the trial, because the Rigas' counsel had refused to supply it upon request. Further, the plaintiffs assert that were this evidence permitted, the Rigas would suffer no surprise or prejudice, inasmuch as their counsel had interviewed the witness previously.

For their part, the Rigas dispute that they acted improperly with respect to this witness. The evidence's relevance was tenuous — he might not even have been at the Darlington building. The District Court reasonably concluded that the probative value of the testimony was outweighed by its prejudicial impact.

Similarly, properly excluded was the evidence the Rigas proffered that the Alexanders were not creditworthy. Though the Rigas maintain that the Alexanders had to show that they were fully qualified to rent the apartment ultimately, the Alexanders only needed to show that they were qualified to be applicants, to view the apartment, and be treated no differently from other applicants. If this case were about the Alexanders' unsuccessful apartment application and they

could make a prima facie showing of discrimination, then the evidence of creditworthiness would indeed be relevant. Under the facts with which we are presented, however, the evidence was not relevant, and the District Court properly excluded it. Finally, the Rigas claim that they should have been permitted to offer evidence of the Alexanders' untruthful statements on documents such as employment applications. The Rigas obviously sought to introduce this evidence to show conformity therewith. The District Court properly excluded this too, because it was evidence of other bad acts not admissible to prove the Alexanders' character under Fed. R. Evid. 404 and not within the exceptions outlined in Fed. R. Evid. 404(b).

IV.

We will reverse the decision of the District Court granting judgment to the Rigas as against the Alexanders and the decision declining to submit the question of punitive damages to the jury. We direct the District Court to enter judgment for the Alexanders, and for other declaratory relief consistent with our opinion, as well as costs, including reasonable attorney's fees, to the Alexanders and the FHP and to remand the case for a new trial solely to present to a jury the question of punitive damages as against both Mr. and Mrs. Riga.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 9, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-49

RONALD ALEXANDER, FAYE ALEXANDER
and the FAIR HOUSING PARTNERSHIP
OF GREATER PITTSBURGH, INC.,

Plaintiffs,

vs.

JOSEPH RIGA and MARIA A. RIGA,
a/k/a CARLA AGNOTTI,

Defendants

MEMORANDUM

I

Before the court are the following post-trial motions filed by the parties in this action brought pursuant to the Fair Housing Act (FHA), Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*:[1]

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1. Before the commencement of trial, plaintiffs abandoned the claims they had asserted against defendants under Sections 1981 and 1982 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982.

Appendix B

1. Plaintiffs' Motion for Judgment Notwithstanding the Verdict or for a New Trial on Damages (Document No. 82);

2. Plaintiffs' Motion for Hearing on Injunctive and Equitable Relief (Document No. 83);

3. Plaintiffs' Motion for Award of Attorneys' Fees, Costs and Expenses in their Favor as Prevailing Parties (Document No. 84);

4. Plaintiffs' Motion to Tax Costs against Defendants (Document No. 85);

5. Plaintiffs' Rule 60 Motion Nunc Pro Tunc to Correct Error in Judgment and for Rule 59(e) Relief Nunc Pro Tunc from Judgment (Document No. 96); and

6. Defendants' Motion to Tax Costs Against Plaintiffs (Document No. 87).

After consideration, and for the reasons set forth below, the motions will be denied, with the exception of plaintiffs' Rule 60 Motion Nunc Pro Tunc to Correct Error in Judgment and for Rule 59(e) Relief Nunc Pro Tunc from Judgment, which will be granted in part and denied in part.

II

The procedural history of this case may be summarized as follows:

On January 11, 1996, plaintiffs, Ronald Alexander, Faye Alexander and the Fair Housing Partnership of Greater

Pittsburgh, Inc. (FHP), filed this civil action against defendants, Joseph Riga and Maria A. Riga. In their complaint, plaintiffs sought damages, as well as equitable and injunctive relief, for alleged race discrimination. Specifically, plaintiffs alleged that defendants discriminated against the individual plaintiffs on the basis of their race in violation of the FHA in connection with the attempts of Mr. and Mrs. Alexander to view a rental property owned by defendants in the Squirrel Hill section of the City of Pittsburgh.[2]

Following an eight-day trial in May, 1998, a jury returned eight special verdicts. With respect to Mr. and Mrs. Alexander, the jury found that Mrs. Riga had discriminated against them in violation of the FHA. However, the jury found that the discriminatory conduct of Mrs. Riga was not a legal cause of harm to either Mr. or Mrs. Alexander, and awarded them no monetary damages.[3] As to the FHP, the

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2. The FHA prohibits discrimination in the sale or rental of housing, including the refusal to negotiate for the rental of, or otherwise make unavailable or deny, a dwelling to any person because of race; to discriminate against any person in the terms, conditions or privileges of rental of a dwelling because of race; or to represent to any person because of race that any dwelling is not available for inspection, sale or rental when such dwelling is, in fact, so available. *See* 42 U.S.C. §§ 3604(a), (b) and (d).

3. Although both Mr. and Mrs. Riga were defendants at trial, the special verdicts that were submitted to the jury were limited to determining the liability of Mrs. Riga for discriminatory conduct because only Mrs. Riga was involved in the events leading to this lawsuit. Mr. Riga was in Italy at all relevant times. However, under

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jury found that the discriminatory conduct of Mrs. Riga was a legal cause of harm to the FHP. However, the jury awarded no monetary damages to the FHP.[4] Based on the special verdicts, the court entered judgment in favor of defendants and against plaintiffs, together with costs, on May 26, 1988.

III

The court will discuss the parties' post-trial motions sequentially.

A. Plaintiffs' Motion for Judgment Notwithstanding the Verdict or for a New Trial on Damages

In this motion, plaintiffs assert that a judgment notwithstanding the verdict,[5] as well as the additur of nominal damages in the amount of one dollar for each plaintiff, is required based on evidence that each plaintiff sustained actual

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the law of agency, as well as the fact that the duties imposed by the FHA are non-delegable, Mr. Riga would be liable for any compensatory or nominal damages resulting from his wife's discriminatory conduct in connection with the rental of their jointly owned apartments.

4. The issue of punitive damages had been bifurcated from the issues of liability and compensatory or nominal damages. After the return of the jury's special verdicts, the court declined to put the issue of punitive damages to the jury.

5. As noted by defendants, plaintiffs should have filed this motion under Rule 50(b) of the Federal Rules of Civil Procedure, seeking a judgment in their favor as a matter of law.

harm. In the alternative, plaintiffs assert that a new trial on damages is required because (1) the court erred in refusing to instruct the jury that an award of nominal damages in favor of each plaintiff was required based on the evidence; (2) the court erred in refusing to charge the jury on the issue of punitive damages, despite the jury's failure to award compensatory damages; (3) the court erred in refusing to instruct the jury that an award of compensatory and exemplary damages in favor of the FHP was required based on the evidence; and (4) the court erred in refusing to admit the testimony of Steve Denson, Michael Bowen and Michael Snow regarding other alleged acts of intentional race discrimination by Mrs. Riga against black applicants for apartments.

1. Turning first to the issue of nominal damages, during the charge conference on May 21, 1998, Caroline Mitchell, Esquire, one of plaintiffs' co-counsel, requested the inclusion of a charge on nominal damages in the court's instructions to the jury. The request was granted, and the court included an instruction on nominal damages in its proposed charge, which was provided to counsel in its entirety prior to the time the jury was charged.

The jury was instructed, in relevant part, as follows:

* * *

> . . . Finally, in connection with the issue of damages, if you find that the plaintiffs are entitled to verdicts in their favor in accordance with these instructions, but you do not find that the plaintiffs

> have sustained substantial actual damages, then you may return a verdict for the plaintiffs in some nominal sum, such as one dollar on account of actual damages. . . .
>
> * * *

Neither Ms. Mitchell nor her co-counsel, Timothy P. O'Brien, Esquire, objected to the form of the charge on nominal damages before or after it was given to the jury, despite the fact that the charge permitted, but did not require, the jury to award nominal damages if the jury found that plaintiffs did not sustain substantial actual damages. The first time the language of the charge on nominal damages was challenged by plaintiffs was in a post-trial motion, after the jury had been discharged.

Plaintiffs argue that the holding of the Supreme Court of the United States in *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), requires an award of nominal damages when a fact finder determines that a violation of an "absolute right," such as the right to be free from race discrimination, has occurred without proof of actual injury. In response to this argument, defendants take the position that the "absolute right" referred to in *Carey*, a denial of procedural due process, was "absolute" because the denial was a constitutional tort in violation of 42 U.S.C. § 1983, and that the violation of a statutory right, such as a violation of the FHA, is not a violation of an "absolute right," entitling the victim to nominal damages in the absence of proof of injury.

Appendix B

In support of their position, defendants cite *Walker v. Anderson Elec. Connection*, 944 F.2d 841 (8th Cir.), *cert. denied*, 506 U.S. 1078, 113 S.Ct. 1043, 122 L.Ed.2d 352 (1998), a case involving sexual harassment in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000(e) *et seq.*, in which the United States Court of Appeals for the Eighth Circuit stated:

* * *

> Walker argues that *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), requires the automatic award of nominal damages upon the finding of a Title VII violation regardless of Rule 51 and the federal Courts' dislike of additur. Carey does not, however, address the issue of nominal damages in a Title VII action.
>
> *Carey* involved interpretation of 42 U.S.C. § 1983, (footnote omitted) which provides a remedy for violations of constitutional rights by persons acting under color of state law. Emphasizing the absolute nature of constitutional rights and "the importance to organized society that those rights be scrupulously observed," *Carey*, 435 U.S. at 266, 98 S.Ct. at 1053, the Court mandated the award of nominal damages upon the finding of a procedural due process violation even where no actual injury had been shown. By contrast, this case involves, not a violation of constitutional rights, but merely, a violation of purely statutory rights under Title VII. Nothing

in *Carey* mandates the award of nominal damages for statutory violations. (footnote omitted).

* * *

944 F.2d at 845.

After consideration, the court believes that the distinction made by the Eighth Circuit in *Walker* concerning statutory violations as opposed to violations of "absolute rights" confirmed by the Constitution is a valid one, and that the violation of the Alexanders' rights under the FHA did not mandate an award of nominal damages in favor of them or the FHP.[6]

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6. In connection with plaintiffs' motion for the additur of one dollar in nominal damages for each plaintiff, on September 21, 1998, plaintiffs' co-counsel, Mr. O'Brien, sent a letter to the court to bring to the court's attention the decision of the United States Court of Appeals for the Second Circuit in *Gibeau v. Nellis*, 18 F.3d 107 (2d Cir.1994). In *Gibeau*, a criminal contemnor, who was incarcerated, brought a Section 1983 action against a jail officer, alleging excessive use of force. The district court entered judgment on the jury verdict, finding that the officer had used excessive force, but awarding no damages. On appeal, the Second Circuit held, *inter alia*, that the district court should have instructed the jury that it was required to award nominal damages if it found that the plaintiff's Eighth Amendment rights were violated. The Second Circuit then remanded the case to the district court for the entry of nominal damages in favor of the plaintiff, concluding that such action would not impermissibly invade the province of the jury because nominal damages were mandatory under the circumstances of that case.

Defense counsel, Thomas M. Hardiman, Esquire, responded to Mr. O'Brien's letter on September 24, 1998, noting that the decision

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In any event, it appears to the court that plaintiffs have waived their right to assert a post-trial claim of error based on the form of the nominal damage charge given to the jury by failing to object to the charge, as written, either before or after the charge was given to the jury. When a party fails to make a timely objection to a jury instruction, the objection is waived and the instruction is reviewed only for "plain error."

In *Osei-Afriyie v. Medical College of Pennsylvania*, 937 F.2d 876 (3d Cir.1991), the United States Court of Appeals for the Third Circuit addressed the issue of plain error, stating:

* * *

> Plain errors are those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed.2d 555 (1936). They are errors that "undermine the fundamental fairness of the trial

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of the Second Circuit in *Gibeau* is inapposite because the case involved a claim under Section 1983 for the violation of a constitutional right by a state actor, not a statutory claim against a private citizen. Based on the court's conclusion that the distinction made by the Eighth Circuit in *Walker* concerning statutory violations as opposed to violations of "absolute rights" under the Constitution is a valid one, the decision of the Second Circuit in *Gibeau* does not alter the court's conclusion that an award of nominal damages is not mandated in this case.

> and contribute to a miscarriage of justice." *United States v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 1047, 84 L.Ed.2d 1 (1985). The Supreme Court has cautioned that the doctrine is to be used "sparingly," *United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 1592 n. 14, 71 L.Ed.2d 816 (1982), and only where the error was sure to have had "an unfair prejudicial impact on the jury's deliberations," *Young*, 470 U.S. at 16 n. 14, 105 S.Ct. at 1047 n. 14.
>
> * * *

937 F.2d at 881-882.

Applying this standard in the present case, the court simply cannot conclude that the nominal damage charge given to the jury "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice," or that the charge had "an unfair prejudicial impact on the jury's deliberations." Therefore, the court declines to grant plaintiffs' request for judgment notwithstanding the verdict or for the additur of one dollar in nominal damages for each plaintiff.

2. As to the issue of punitive damages, such damages may be awarded for violations of federal law when a defendant's conduct is "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1239 (D.C.Cir.1997), *quoting*, *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625,

1640, 75 L.Ed.2d 632 (1982). As noted in footnote 4, the issue of punitive damages was bifurcated and was not submitted to the jury with the issues of liability and compensatory or nominal damages. After the jury returned its verdicts awarding neither compensatory nor nominal damages to any plaintiff, the court declined to submit to the jury the issue of punitive damages and the jury was discharged.

The court believed, and continues to believe, that, by its refusal to award compensatory or nominal damages, the jury did not consider the conduct of Mrs. Riga to have been the result of an evil motive or intent or to have involved reckless or callous indifference to the federally protected rights of plaintiffs. Moreover, as to Mr. and Mrs. Alexander, the jury found that Mrs. Riga's conduct was not a legal cause of harm to them. After the jury verdicts were returned, the court concluded that, because the jury had found that Mrs. Riga's discrimination did not cause harm to the Alexanders, it would be inappropriate to permit the jury to award punitive damages to them.

The court agrees with defendants that, in order to recover punitive damages, the Alexanders should be required to prove more than intentional discrimination by Mrs. Riga. Otherwise, punitive damages would follow as a matter of course in every case in which intentional discrimination were established, contrary to the general principle that punitive damages "represent a limited remedy, to be reserved for special circumstances." *Savarese v. Agriss*, 883 F.2d 1194, 1205 (3d Cir.1989). (Defendants' Response to Plaintiffs' Motion for Judgment Notwithstanding the Verdict or for a New Trial on Damages, p. 12).

Appendix B

According to the court's recollection of the trial testimony and the court's trial notes, Mrs. Alexander testified that Mrs. Riga's conduct did not cause her to cry, to become ill, to suffer any emotional distress or to seek medical or psychological care, and Mr. Alexander testified that, although he suffered emotional distress as a result of Mrs. Riga's conduct, he sought no medical attention or psychological counseling. Based on the Alexanders' own testimony, the court agrees with defendants that there was no evidence suggesting outrageous conduct on the part of Mrs. Riga "beyond that which may attach to any finding of intentional discrimination." (Defendants' Response to Plaintiffs' Motion for Judgment Notwithstanding the Verdict or for a New Trial on Damages, pp. 13-14). Accordingly, the court believes that the evidence offered by plaintiffs at trial did not support an award of punitive damages in the Alexanders' favor.

With respect to the FHP, the jury did find that Mrs. Riga's discrimination was a legal cause of harm to the FHP, but declined to award damages. There was no evidence, however, that, prior to the initiation of this action, Mrs. Riga was aware of the existence of the FHP or its involvement in the matter during the period in which the discriminatory conduct occurred. Because of her lack of awareness of the involvement of the FHP, Mrs. Riga could not have acted with an evil motive or intent toward the FHP, or with reckless or callous indifference to its federally protected rights. Further, when the jury verdicts were returned, the court believed it would be inappropriate to permit an award of punitive damages in favor of the FHP, in light of the fact that the jury had awarded neither compensatory nor nominal

damages to it, as well as the failure of Mr. and Mrs. Alexander to offer any evidence suggesting outrageous conduct on the part of Mrs. Riga "beyond that which may attach to any finding of intentional discrimination." Accordingly, the court declines to grant plaintiffs' request for a new trial based on the court's alleged error in refusing to charge the jury on the issue of punitive damages.

3. Regarding the court's refusal to instruct the jury that an award of compensatory damages in favor of the FHP was required based on the evidence, the court believes that a reasonable jury could have concluded that the FHP was not entitled to recover any damages as a result of Mrs. Riga's discriminatory conduct. Prior to the involvement of the FHP in this case, Mr. Alexander had procured evidence of discrimination through the use of his own "tester," Robin McDonough, a white, female friend.[7] In addition, Ms. Mitchell, one of plaintiffs' co-counsel, employed a private investigator, Jeffrey Lang, to act as a "tester" to gather evidence of discrimination against Mrs. Riga. Under the circumstances, the jury may have concluded that the services of the FHP were insignificant or of no value in this case, and that, therefore, the FHP should not recover any compensatory damages.

Further, with respect to the testimony offered by the FHP through Andrea Blinn, its Executive Director, concerning

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7. "Testers" are individuals who, without any intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of discriminatory housing practices. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982).

its alleged damages, which consisted of "tester" fees, Ms. Blinn's time and the time of in-house counsel for the FHP, defendants elicited testimony from Ms. Blinn on cross-examination regarding the substantial federal funding received by the FHP in 1995. Based on this testimony, a reasonable jury could have concluded that the FHP sustained no actual damages as a result of investigating Mrs. Riga's conduct. Accordingly, the court declines to grant plaintiffs' request for a new trial based on the court's alleged error in refusing to charge the jury that it was required to award compensatory damages in favor of the FHP based on the evidence.

4. Finally, in connection with plaintiffs' assertion that the court erred by excluding the testimony of Steve Denson, Michael Bowen and Michael Snow, this testimony was apparently to be proffered by plaintiffs to show other intentional acts of race discrimination by Mrs. Riga. Specifically, in their amended pretrial statement, plaintiffs state: "Michael Snow will testify that he and other CMU students Michael Bowen (black) and Steven Denson (native american) were shown an apartment in Squirrel Hill by Maria Riga, and were treated less favorably when the Rigas learned that one of the roommates (Bowen) would be a black man. Bowen and Snow will testify that the students were so troubled by such behavior that it was felt that the Rigas should not be allowed to participate in the campus housing program due to their discriminatory attitude against blacks." (Plaintiffs' Amended Pretrial Statement, p. 12).

With respect to Mr. Denson, the court notes, as an initial matter, that, although Mr. Snow and Mr. Bowen were listed

as potential liability witnesses in plaintiffs' amended pretrial statement, Mr. Denson was not so listed. In any event, the present case was a disparate treatment, not a disparate impact, case. Therefore, the court ruled that the deposition testimony of Mr. Denson should not be admitted in evidence pursuant to Federal Rule of Evidence 404(b), because the ccurt believed that the relevance of such testimony would be substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403. Regardless whether the exclusion of the testimony of Mr. Denson was proper under the Federal Rules of Evidence, his testimony would have been relevant only to the issue of Mrs. Riga's discriminatory conduct, and not to the issue of the harm legally caused to the Alexanders by such conduct or to the issue of damages. For this reason alone, the exclusion of the testimony of Mr. Denson could not justify the grant of a new trial in this case.

As to Mr. Snow and Mr. Bowen, the court does not believe that plaintiffs proffered their testimony at trial. However, if their testimony was also excluded, it was for the same reason as the exclusion of Mr. Denson's testimony and does not justify a new trial in this case.

B. Plaintiffs' Motion for Hearing on Injunctive and Equitable Relief

On May 28, 1998, six days after the jury's verdicts were returned in this case, and the jury was discharged, plaintiffs filed their Motion for Hearing on Injunctive and Equitable Relief. Although plaintiffs had requested injunctive and equitable relief in their complaint and in their original and amended pretrial statements, at no time during the pretrial

conferences with the court or during the trial itself, did plaintiffs' attorneys refer to their requests for injunctive and equitable relief. Based on the failure of plaintiffs' counsel to raise the issue of injunctive and equitable relief prior to the conclusion of the trial of this case, the court declines to grant their request for such relief.

Assuming, *arguendo*, that plaintiffs had timely raised the issue of equitable and injunctive relief, the court nevertheless would decline to grant such relief based on the conclusion that it is unnecessary. First, the conduct of Mrs. Riga that was the subject of plaintiffs' discrimination claims occurred in 1995. No evidence was offered of any such discriminatory conduct since 1995, and the court believes that there is very little risk of recurrent violations of federal law by Mrs. Riga that would warrant injunctive relief. Second, in the court's opinion, it is significant that the Rigas have rented units in their apartment buildings to African Americans since the events giving rise to this lawsuit as evidenced by the affidavits of Vera Jefferson and Dorothy Williamson, which were submitted by defendants in opposition to plaintiffs' Motion for Hearing on Injunctive and Equitable Relief. Under the circumstances, this post-trial motion will also be denied.

C. Plaintiffs' Motion for Award of Attorneys' Fees, Costs and Expenses in their Favor as Prevailing Parties

Next, plaintiffs assert that they are prevailing parties in this action, and they seek an award of attorneys' fees and costs under the FHA, which provides in relevant part:

* * *

Appendix B

§ 3613 Enforcement by private persons

* * *

(c) Relief which may be granted

* * *

> **(2)** In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. . . .

42 U.S.C. § 3613(c)(2).

In turn, Section 3602(o) of the FHA provides that "prevailing party" has the same meaning as such term has in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.[8]

In *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), the Supreme Court of the United States discussed the standard to be applied in determining whether

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8. 42 U.S.C. § 1988 provides in relevant part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 . . . , or title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

a civil rights plaintiff was a prevailing party in order to qualify for attorney's fees under Section 1988 as follows:

* * *

> . . . to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt*, *supra*, at 760, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. See *Hewitt*, *supra*, at 764. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." *Rhodes*, *supra*, at 4. Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. *Garland*, *supra*, at 792-793. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. . . .
>
> * * *
>
> . . . . To be sure, a judicial pronouncement that the defendant has violated the Constitution,

> unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, "the moral satisfaction [that] results from any favorable statement of law" cannot bestow prevailing party status. *Hewitt*, 482 U.S., at 762. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant. . . .
>
> * * *

506 U.S. at 111-113, 113 S.Ct. at 573-574.

Based on the special verdicts returned by the jury in this case, as well as the court's determination that plaintiffs are not entitled to injunctive or equitable relief, the court concludes that plaintiffs are not prevailing parties. Simply put, this litigation did not effect a "material alteration of the legal relationship of the parties." The defendants' behavior has not been modified "in a way that directly benefits the plaintiffs." At best, the jury's special verdicts provided plaintiffs with "moral satisfaction," which is insufficient to bestow prevailing party status on them. Under the circumstances, plaintiffs' Motion for Award of Attorneys' Fees, Costs and Expenses in their Favor as Prevailing Parties will be denied.

D. Plaintiffs' Motion to Tax Costs against Defendants

Because the court concludes that plaintiffs are not prevailing parties in this litigation for the reasons set forth

above, the court will also deny their Motion to Tax Costs against Defendants.

E. Plaintiffs' Rule 60 Motion Nunc Pro Tunc to Correct Error in Judgment and for Rule 59(e) Relief Nunc Pro Tunc from Judgment

As noted above in connection with the procedural history of this case, the court entered a judgment in favor of defendants and against plaintiffs on May 26, 1998 based on the jury's special verdicts. That judgment reads as follows:

> IT IS ORDERED AND ADJUDGED that, in accordance with the special verdicts returned by the jury on May 22, 1998, judgment be, and hereby is, entered in favor of Defendants Joseph Riga and Maria A. Riga, a/k/a Carla Agnotti, and against the Plaintiffs Ronald Alexander and Faye Alexander and the Fair Housing Partnership of Greater Pittsburgh, Inc., together with costs.

(Document No. 80).

In their Rule 60 Motion Nunc Pro Tunc to Correct Error in Judgment and for Rule 59(e) Relief Nunc Pro Tunc from Judgment, plaintiffs seek "an order granting judgment as a matter of law for Plaintiffs, correcting the entry of judgment to reflect declaratory and nominal damages and costs for Plaintiffs, not Defendants, opening the entry of judgment and costs for defendants as prematurely granted, and continuing generally the time within which Plaintiffs must file a Fee Petition until after a final order is entered disposing of Plaintiffs' post trial motions." (Document No. 96, p. 4).

After consideration, this post-trial motion of plaintiffs will be granted to the extent that an amended judgment will be filed, entering judgment in favor of the FHP and against defendants on the issue of liability under the FHA only and directing each party to bear their own costs. In all other respects, the judgment, as entered on May 26, 1998, will remain the same.[9]

F. Defendants' Motion to Tax Costs against Plaintiffs

Finally, with respect to defendants' Motion to Tax Costs against Plaintiffs, as noted above, the court, upon further consideration, concludes that the judgment entered on May 26, 1998 should be amended to direct that the parties bear their own costs.[10] Because the jury found that Mrs. Riga's discriminatory conduct was not the legal cause of harm to the Alexanders and declined to award compensatory or nominal damages in favor of any plaintiff, defendants argue that they were the prevailing parties in this case and that they should be entitled to recover their costs in defending this action. However, in view of the jury's determination that Mrs. Riga did, indeed, violate the FHA by engaging in discriminatory conduct, the court believes that there should

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9. The court's willingness to amend the judgment originally entered on May 26, 1998 in favor of defendants and against the FHP does not affect, in any way, the court's conclusions regarding the FHP's motion for nominal damages or motion for a new trial on compensatory and punitive damages or alter the court's conclusion that the FHP is not a prevailing party in this action.

10. Defendants seek to recover costs in the amount of $5,327.95 from plaintiffs.

be some consequence to the Rigas for such conduct. Accordingly, regardless whether defendants were, technically, the prevailing parties as to the Alexanders, the court declines to exercise its discretion to award costs in favor of defendants and against the Alexanders.

An order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-49

RONALD ALEXANDER, FAYE ALEXANDER
and the FAIR HOUSING PARTNERSHIP
OF GREATER PITTSBURGH, INC.,

Plaintiffs,

vs.

JOSEPH RIGA and MARIA A. RIGA,
a/k/a CARLA AGNOTTI,

Defendants

ORDER

AND NOW, this 9th day of October, 1998, in accordance with the foregoing memorandum, it is ORDERED as follows:

1. Plaintiffs' Motion for Judgment Notwithstanding the Verdict or for a New Trial on Damages (Document No. 82) is denied.

2. Plaintiffs' Motion for Hearing on Injunctive and Equitable Relief (Document No. 83) is denied.

3. Plaintiffs' Motion for Award of Attorneys Fees, Costs and Expenses in their Favor as Prevailing Parties (Document No. 84) is denied.

4. Plaintiffs' Motion to Tax Costs against Defendants (Document No. 85) is denied.

5. Plaintiffs' Rule 60 Motion Nunc Pro Tunc to Correct Error in Judgment and for Rule 59(e) Relief Nunc Pro Tunc from Judgment (Document No. 96) is granted in part and denied in part.

6. Defendants' Motion to Tax Costs Against Plaintiffs (Document No. 87) is denied.

s/ William L. Standish
William L. Standish
United States District Judge

APPENDIX C — AMENDED JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 9, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

CASE NUMBER: CA 96-49

RONALD ALEXANDER, FAYE ALEXANDER
and the FAIR HOUSING PARTNERSHIP
OF GREATER PITTSBURGH, INC.

V.

JOSEPH RIGA and MARIA A. RIGA,
a/k/a CARLA AGNOTTI

AMENDED JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict by special verdicts.

* * *

IT IS ORDERED AND ADJUDGED as follows:

1. The judgment entered by the court on May 26, 1998 is hereby vacated.

2. In accordance with the Special Verdicts returned by the jury on May 22, 1998, judgment is entered in favor of

defendants and against plaintiffs Ronald Alexander and Faye Alexander.

3. In accordance with the Special Verdicts returned by the jury on May 22, 1998, judgment is entered in favor of plaintiff Fair Housing Partnership of Greater Pittsburgh, Inc. and against defendants as to liability under the Fair Housing Act. No damages are awarded in favor of said plaintiff.

4. The parties are to bear their own costs.

JUDGMENT IS HEREBY ENTERED ACCORDINGLY.

10-9-98	s/ [illegible]
Date	*Clerk*
s/ William A. Standish	s/ [illegible]
	(By) Deputy Clerk

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED MARCH 10, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-49

RONALD ALEXANDER, FAYE ALEXANDER
and the FAIR HOUSING PARTNERSHIP
OF GREATER PITTSBURGH, INC.,

Plaintiffs,

vs.

JOSEPH RIGA and MARIA A. RIGA,
a/k/a CARLA AGNOTTI,

Defendants

MEMORANDUM

I

In this civil action, plaintiffs, Ronald Alexander, Faye Alexander and the Fair Housing Partnership of Greater Pittsburgh, Inc., seek damages from defendants, Joseph Riga and Maria A. Riga, under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*,[1]

1. The Fair Housing Act prohibits discrimination in the sale or rental of housing, including the refusal to negotiate for the rental (Cont'd)

alleging that defendants discriminated against the individual plaintiffs on the basis of their race in connection with the individual plaintiffs' attempts to view a rental property owned by defendants. The individual plaintiffs also assert a claim against defendants for race discrimination under Sections 1981 and 1982 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982.[2] Presently, before the court is

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(Cont'd)
of, or otherwise make unavailable or deny, a dwelling to any person because of race; to discriminate against any person in the terms, conditions or privileges of rental of a dwelling because of race; or to represent to any person because of race that any dwelling is not available for inspection, sale or rental when such dwelling is, in fact, so available. *See* 42 U.S.C. §§ 3604(a), (b) and (d).

2. These statutes provide:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

(Cont'd)

defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56. For the reasons set forth below, the motion will be denied.

II

For purposes of the present motion, the following facts are undisputed:[3]

Plaintiffs Ronald Alexander and Faye Alexander (collectively, the Alexanders), husband and wife, are Afro-American. Defendants Joseph Riga and Maria Riga (collectively, the Rigas), husband and wife, are Caucasian. The Rigas are the owners of six rental properties in the City of Pittsburgh, including a five-unit dwelling located at 5839

(Cont'd)

§ 1982. Property rights of citizens

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

3. As they must, defendants accept as true any facts pleaded by plaintiffs regarding the alleged efforts of the individual plaintiffs and individuals acting on behalf of the organizational plaintiff to view an apartment advertised for rent by defendants for purposes of their summary judgment motion. (Defendants' Brief in Support, p. 2). Nevertheless, defendants maintain that they are entitled to a judgment in their favor as to all claims asserted in plaintiffs' amended complaint.

Darlington Road in the Squirrel Hill section of the City of Pittsburgh that was purchased by the Rigas in May, 1995. (Plaintiffs' Appendix in Opposition, Exh. 6, pp. 11-13, 24).

On Sunday, September 17, 1995, Mr. Alexander saw an ad in the Pittsburgh Post-Gazette, advertising a unit for rent in the Rigas' Darlington Road property.[4] Mrs. Alexander called the telephone number in the ad to make an appointment to see the apartment, and she spoke to a woman named Maria.[5] An appointment to see the apartment was scheduled for the next day, September 18, 1995, at 12:00 p.m. Due to Mr. Alexander's work schedule, however, the Alexanders changed the appointment to 1:00 p.m. (Plaintiffs' Appendix in Opposition, Exh. 1, p. 53, Exh. 2, pp. 15-16).

On September 18, 1995, the Alexanders went to the Rigas' Darlington Road property to view the apartment at the scheduled time, parking in front of the property adjacent to the Rigas' property. Shortly thereafter, Mrs. Riga drove up Darlington Road in a dark colored Jeep-like vehicle, and she parked in the driveway of her Darlington Road property. Mrs. Riga walked up to the Alexanders' car, tapped on the driver's window and informed the Alexanders that they should not have changed the time of their appointment to see the apartment because she had rented the apartment in

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4. The apartment advertised for rent in this five-unit building was Apartment No. 2. (Defendants' Motion for Summary Judgment, Exh. D, Plaintiffs' Appendix in Opposition, Exh. 6, p. 16).

5. The telephone number in the Pittsburgh Post-Gazette ad was (412) 963-8706, which is the Rigas' unlisted telephone number. (Plaintiffs' Appendix in Opposition, Exh. 6, p. 24).

the meantime. Mrs. Rigas told the Alexanders that she had tried to call them to tell them that the apartment had been rented; however, when the Alexanders subsequently checked the messages on their telephone answering machine, there was no message from Mrs. Riga. (Plaintiffs' Appendix in Opposition, Exh. 1, pp. 57, 99-102).

On Sunday, September 24, 1995, Mr. Alexander saw another ad in the Pittsburgh Post-Gazette for the apartment in the Rigas' Darlington Road property, and, in response to this ad, Mr. Alexander asked a friend, Robin McDonough, a white female, to call the telephone number in the ad to schedule an appointment to see the apartment.[6] Ms. McDonough spoke to a woman and scheduled an appointment to see the apartment on September 27, 1995; however, Ms. McDonough did not keep this appointment. (Plaintiffs' Appendix in Opposition, Exh. 1, pp. 104-105, Exh. 8, p. 10, Exh. 9).

Because Mr. Alexander was angry that Ms. McDonough had been given an appointment to see the apartment, which was allegedly rented when the Alexanders attempted to view it on September 18, 1995, he called the telephone number in the newspaper ad on September 26, 1995 and scheduled an appointment under the fictitious name, James Irwin, to see the apartment on September 29, 1995 at 11:30 a.m. (Plaintiffs' Appendix in Opposition, Exh. 1, pp. 105-106).

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6. Exhibit Q to defendants' motion for summary judgment is a Pittsburgh Post-Gazette invoice demonstrating that Mrs. Riga advertised Apartment No. 2 for rent in the Pittsburgh Post-Gazette on September 24, 1995. According to the Rigas, the Alexanders produced this invoice. (Defendants' Motion for Summary Judgment, p. 15).

Appendix D

Mr. Alexander drove to the Rigas' Darlington Road property on September 29, 1995, parked around the corner from the property and walked to it. Mrs. Riga was sitting on the front steps of the property, and, when Mr. Alexander indicated that he was there to see the apartment, Mrs. Riga stated that she had forgotten her keys.[7] When Mr. Alexander asked Mrs. Riga if he could make another appointment to see the apartment, she told him to call her. As Mr. Alexander started to walk down the steps to the driveway to leave the property, Mrs. Riga got up from the front steps of the property and entered the property by using her keys. Mr. Alexander then went home and contacted his attorney, Caroline Mitchell, as well as Andrea Blinn of the defendant Fair Housing Partnership of Greater Pittsburgh, Inc. (Fair Housing Partnership), concerning his perceived discrimination.[8] (Plaintiffs' Appendix in Opposition, Exh. 1, pp. 106, 109-114).

Mr. Alexander called Mrs. Riga approximately nine times after September 29, 1995 in an attempt to schedule another appointment to see the advertised apartment in the

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7. In this connection, Mr. Alexander testified during his deposition that, when he walked up to Mrs. Riga on September 29, 1995, "she put her hands, like, over her keys, and she said I forgot my keys." (Plaintiffs' Appendix in Opposition, Exh. 1, p. 109).

8. Andrea Blinn is the Executive Director of the Fair Housing Partnership, a non-profit corporation organized under the laws of the Commonwealth of Pennsylvania. The mission of the Fair Housing Partnership, as stated in its by-laws, is "to eliminate housing discrimination and to promote fair housing in the Greater Pittsburgh area through collaborative undertakings in education, monitoring and research, legislative reform, and community involvement." (Fair Housing Partnership's Brief in Opposition, Exh. 1).

Rigas' Darlington Road property. When Mr. Alexander's telephone calls were answered by a woman, she told him that the apartment had been rented, and, when Mr. Alexander left messages on the Rigas' telephone answering machine, his calls were not returned. (Plaintiffs' Appendix in Opposition, Exh. 1, pp. 115-116).

On September 29, 1995, Jeffrey Lang, a white male, called Mrs. Riga and left a message on her telephone answering machine, indicating that he wanted to see the apartment in the Darlington Road property that was advertised for rent. Mrs. Riga returned Mr. Lang's telephone call and an appointment was scheduled for Saturday, September 30, 1995 at 5:00 p.m. Prior to the appointment, Mr. Lang was not asked about his credit history. On Saturday, September 30, 1995, Mrs. Riga showed Apartment No. 2 in the Darlington Road property to Mr. Lang. He was given a rental application and told that he would have to pay for a credit check. Mr. Lang did not make any commitments to Mrs. Riga regarding his intention to lease the apartment, fill out the application or pay for a credit check.[9] (Plaintiffs' Appendix in Opposition, Exh. 9).

Dennis Orvosh, a white male, serves as a volunteer tester for the Fair Housing Partnership.[10] On Thursday, September

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9. It is not clear from the present record in this case whether Mr. Lang was asked by the Alexanders or the Fair Housing Partnership to contact the Rigas regarding the availability of Apartment No. 2 in the Darlington Road property.

10. "Testers" are individuals who, without any intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of discriminatory housing practices. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

28, 1995, Mr. Orvosh was asked to call Mrs. Riga concerning the availability of the apartment in the Darlington Road property.[11] On Friday, September 29, 1995, Mrs. Riga returned Mr. Orvosh's telephone call and told him that the apartment was available. An appointment for Mr. Orvosh to see the apartment was scheduled for the next day. Prior to the appointment, Mrs. Riga did not question Mr. Orvosh about his credit history, and, on Saturday, September 30, 1995, Mrs. Riga showed Mr. Orvosh the apartment in the Darlington Road property. Mrs. Riga told Mr. Orvosh that, if he was interested in the apartment, he would have to fill out a rental application and undergo a credit check. (Plaintiffs' Appendix in Opposition, Exh. 10).

At the request of the Fair Housing Partnership, Mr. Orvosh called Mrs. Riga on October 2, 1995 and scheduled another appointment to see Apartment No. 2 in the Darlington Road property on October 4, 1995. During this telephone conversation, Mr. Orvosh was informed by Mrs. Riga that the apartment was still available. Again, Mrs. Riga did not mention Mr. Orvosh's credit history. On October 3, 1995, Mr. Orvosh canceled his appointment with Mrs. Riga to see the apartment for a second time. (Plaintiffs' Appendix in Opposition, Exh. 10).

According to the October 4, 1995 "Testing Summary" prepared by Andrea Blinn, Executive Director of the Fair

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11. Based on the date that Mr. Orvosh claims that he was asked to call Mrs. Riga for purposes of serving as a tester for the Fair Housing Partnership, it appears that the Alexanders contacted the Fair Housing Partnership prior to Mrs. Riga's failure to show Mr. Alexander the Darlington Road apartment on September 29, 1995.

Housing Partnership, Mr. Orvosh was "paired" with Daria Mitchell, a black female, for the testing of the Rigas' Darlington Road property by the Fair Housing Partnership. Pursuant to this test, Ms. Mitchell called (412) 963-8706 four times on September 29, 1995, leaving three messages regarding the ad in the Pittsburgh Post-Gazette for the apartment in the Rigas' Darlington Road property. Mrs. Riga called back and left a message on Ms. Mitchell's voice mail, indicating that she could see the apartment the next day, September 30, 1995, between 11:00 a.m. and 11:30 a.m. Later that evening, Mrs. Riga called Ms. Mitchell back and rescheduled the appointment to see the apartment to 1:00 p.m. the next day. At that time, Mrs. Riga told Ms. Mitchell that the address of the property was 583 Darlington Road. (Defendants' Motion for Summary Judgment, Exh. O).

When Ms. Mitchell went to see the apartment the next day, she could not find the address given to her by Mrs. Riga. As a result, she walked down Darlington Road, looking for a "For Rent" sign with the Rigas' telephone number. Ms. Mitchell found the sign on the property located at 5839 Darlington Road. She rang the doorbell but no one answered. As a result, she left and walked back to her car. (Defendants' Motion for Summary Judgment, Exh. O).

Later that day, Mrs. Riga paged Ms. Mitchell and said that she could see the apartment at 5:30 p.m. When Ms. Mitchell questioned Mrs. Riga about being given the wrong address, Mrs. Riga insisted that she had given Ms. Mitchell the correct address. When Ms. Mitchell arrived at the Darlington Road property at 5:30 p.m., Mrs. Riga was coming out of the property with a man named Jeff. Mrs. Riga

indicated that Jeff had just completed an application for the apartment, and that he was going to "get them money." Despite the apparent rental of the advertised apartment, Mrs. Riga offered to show it to Ms. Mitchell. When Ms. Mitchell asked Mrs. Riga if Jeff was going to get the apartment, she responded "yes." Mrs. Riga showed Ms. Mitchell a piece of paper, indicating that it was a check from Jeff. However, Ms. Mitchell did not think that the piece of paper looked like a check. She thanked Mrs. Riga and shook her hand. Mrs. Riga then said that she would call Ms. Mitchell if another apartment became available. Based on these events, Ms. Blinn concluded that there was evidence of possible housing discrimination and stated so in her "Testing Summary." (Defendants' Motion for Summary Judgment, Exh. O).

On Tuesday, October 3, 1995, Heidi Sestrich, a white female, was asked by the Alexanders' attorney, Caroline Mitchell, to serve as a tester for the Fair Housing Partnership by calling Mrs. Riga to inquire into the availability of the advertised apartment in the Darlington Road property, and Ms. Sestrich agreed to do so. She called the Rigas' telephone number and left a message on their telephone answering machine. The next day, October 4, 1995, at approximately 1:50 p.m., a woman returned Ms. Sestrich's telephone call, leaving a message that the apartment was still available and that she could schedule an appointment to see it. Ms. Sestrich was instructed to call before 2:30 p.m. to make an appointment. When she received this message, Ms. Sestrich informed Attorney Mitchell of the message. (Plaintiffs' Appendix in Opposition, Exh. 12).

Appendix D

On Friday, October 6, 1995 at approximately 11:51 a.m., and on Saturday, October 7, 1995 at approximately 9:08 a.m., a woman called Ms. Sestrich again, leaving messages about the advertised apartment in the Rigas' Darlington Road property. Ms. Sestrich informed Attorney Mitchell of these telephone messages, and, on Monday, October 9, 1995, Ms. Sestrich and Attorney Mitchell played back the messages on Ms. Sestrich's telephone answering machine concerning the Rigas' apartment. The tape recorded messages were given to Attorney Mitchell at her request. (Plaintiffs' Appendix in Opposition, Exh. 12).

On October 8, 1995, Mr. Alexander's friend, Robin McDonough, called Mrs. Riga again to schedule another appointment to see the advertised apartment in the Darlington Road property. Mrs. Riga scheduled an appointment for Ms. McDonough for Monday, October 9, 1995, and Ms. McDonough was shown the apartment. Prior to being shown the apartment, Ms. McDonough was not asked about her credit history. (Plaintiffs' Appendix in Opposition, Exh. 9). Apartment No. 2 in the Rigas' Darlington Road property ultimately was leased to Dr. Rajendra and Kimberly Sinha in November, 1995.[12] (Defendants' Motion for Summary Judgment, Exh. D).

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12. In contrast to the Alexanders' allegations, during her deposition, Mrs. Riga testified she does not remember receiving a call from Mrs. Alexander in September, 1995, regarding the apartment advertised for rent in the Darlington Road property; that she does not remember meeting the Alexanders at the Darlington Road property on September 18, 1995; that she does not remember telling the Alexanders that they should not have changed the time

(Cont'd)

Appendix D

With respect to the Rigas' tenants in the Darlington Road property, Apartment No. 1 was rented to Susan Augustitus shortly after the Rigas purchased the property in May, 1995. Apartment No. 2 was leased to Chang Su Chan and his wife, Jing Chan, who entered into a lease with the Rigas after their purchase of the building. Mr. Chan's lease was due to expire in February, 1996. However, Apartment No. 2 became available to rent and was advertised by the Rigas in September, 1995 because Mr. and Mrs. Chan moved out prior to the expiration of their lease with the Rigas. Apartment No. 3 was leased to Martha Teplica, who had been a tenant of the previous owner of the building. Apartment No. 4 was leased to Rose Abrams in June, 1995, and Apartment No. 5 was leased to Elissa Helms and Catherine Serventi in November, 1995.[13] (Plaintiffs' Appendix in Opposition, Exh. 6, pp. 19-21, 37).

Prior to the Rigas' rental of Apartment No. 2 in the Darlington Road property to the Sinhas in November, 1995, Mrs. Rigas asked Landlord Service Bureau to perform a credit check on Mrs. Sinha, and Mrs. Riga received a certificate of recommendation for Mrs. Sinha. Mrs. Riga did

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(Cont'd)
of their appointment because she had rented the apartment in the interim; and that she does not remember meeting any Afro-American couple for purposes of showing them the apartment advertised for rent in the Darlington Road property. (Plaintiffs' Appendix in Opposition, Exh. 6, pp. 68-72).

13. Prior to the lease of Apartment No. 5 to Ms. Helms and Ms. Serventi, the unit had been vacant because it required repairs. (Plaintiffs' Appendix in Opposition, Exh. 6, p. 37).

not ask Landlord Service Bureau to perform a credit check on Dr. Sinha.[14] (Defendants' Motion for Summary Judgment, Exh. D). As to the issue of whether credit checks were performed on the Rigas' other tenants in the Darlington Road property, in response to discovery requests, the Rigas failed to produce any evidence to show that credit checks had been requested for, or performed on, any other tenant in the building.

At the time the Alexanders attempted to view Apartment No. 2 in the Rigas' Darlington Road property, Mr. Alexander had defaulted on credit accounts with Lane Bryant, Kaufmann's, Lazarus and J.C. Penney, and Mrs. Alexander had defaulted on a student loan and an account with Bell Atlantic. In addition, the Alexanders had defaulted on individual accounts with Equitable Gas.[15] (Defendants' Motion for Summary Judgment, Exh. A, pp. 147-151, Exh. B, pp. 39-40). However, prior to discovery in this case, the Rigas did not request any information from the Alexanders regarding their credit history, and they had no knowledge of the Alexanders' credit history.[16] (Plaintiffs' Appendix in Opposition, Exhs. 3 and 4).

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14. In an affidavit submitted in support of defendants' motion for summary judgment, Mrs. Riga states that, based on Mrs. Sinha's good credit history and Dr. Sinha's professional status, she did not request a credit check on Dr. Sinha. (Defendants' Motion for Summary Judgment, Exh. D).

15. The total amount of the debt on these defaulted accounts exceeds $6,700.00. (Defendants' Motion for Summary Judgment, Exhs. G to M).

16. Mr. Riga was in Italy from August 5, 1995 until mid-November, 1995. (Plaintiffs' Appendix in Opposition, Exh. 7,

(Cont'd)

III

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 273 (1986). At the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). The existence of a factual dispute between the parties will defeat an otherwise properly supported motion for summary judgment only if there is a "genuine" issue of "material" fact. *Id.* 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211. Keeping this standard in mind, the court turns to defendants' motion for summary judgment.

IV

Turning first to the Alexanders' claims against the Rigas, in *Chauhan v. M. Alfieri Co., Inc.*, 897 F.2d 123 (3d

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(Cont'd)

p. 10). As a result, the Alexanders dealt exclusively with Mrs. Rigas in connection with their attempts to view Apartment No. 2 in the Rigas' Darlington Road property. However, because the duty not to discriminate in connection with housing under the applicable statutes is a non-delegable duty, Mr. Riga would be liable for any discrimination by Mrs. Riga as the co-owner of the Darlington Road property.

Cir.1990), a prospective tenant, an Indian national, brought an action against a landlord under 42 U.S.C. § 1981 after the landlord denied the prospective tenant's application for the lease of retail space in the landlord's office building. The district court granted the landlord's motion for summary judgment, and the prospective tenant appealed. On appeal, the United States Court of Appeals for the Third Circuit reversed, holding that material issues of fact existed as to whether the landlord's reasons for not renting to the prospective tenant were pretextual. With regard to the plaintiff's prima facie case in an action alleging housing discrimination, the Third Circuit stated:

* * *

> A successful section 1981 claim requires proof of intentional discrimination. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 389, 102 S.Ct. 3141, 3149, 73 L.Ed.2d 835 (1982); *Croker v. Boeing Co.*, 662 F.2d 975, 988 (3d Cir.1981). However, because of the evidentiary difficulties involved in proving discriminatory intent, we have held that summary judgment motions in section 1981 cases are governed by the well-known burden shifting provisions laid down in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), and refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). *See Gunby v. Pennsylvania Electric Co.*, 1840 F.2d 1108, 1115 (3d Cir.1988),

cert. denied, __ U.S. __, 109 S.Ct. 3213, 106 L.Ed.2d 207 (1981); *Lewis v. University of Pittsburgh*, 725 F. 2d 910, 914 (3d Cir.1983), *cert. denied*, 469 U.S. 892, 105 S.Ct. 266, 83 L.Ed.2d 202 (1984). Although we have not had occasion to consider whether the *McDonnell Douglas* formula should be applied to the leasing context, other courts have done so, *see, e.g., Seldon Apartments v. United States Department of Housing and Urban Development*, 785 F.2d 152, 160 (6th Cir.1986) (Fair Housing Act, 42 U.S.C. § 3601 and § 1981 and § 1982); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980) (§ 1982); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038-39 (2d Cir.1979) (Fair Housing Act, 42 U.S.C. § 3604(a)), and we will follow their lead.

Applying the *McDonnell Douglas* formula to this context, Chauhan establishes a prima facie case by proving that: (1) he is in a protected class; (2) he attempted to lease the space; (3) he was a qualified applicant; and (4) the space remained unfilled after he applied. Once a prima facie case is established, the burden then shifts to M. Alfieri to offer a legitimate, non-discriminatory reason for refusing to do business with Chauhan. If M. Alfieri proffers such a reason, the burden shifts back to Chauhan to show that M. Alfieri's explanation is pretextual. The district court properly followed this formula. However, in concluding that "the inconsistencies pointed out

> by Chauhan, while perhaps demonstrating some business inefficiency and miscommunication in the operation of Alfieri, do not lend any support to [Chauhan's] contention [of pretext]," 707 F.Supp. at 166, the district court appears inadvertently to have strayed into the factfinding realm.
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> * * *

897 F.2d at 126-127.

In seeking a judgment in their favor as a matter of law as to the Alexanders' claims of housing discrimination, the Rigas assert that the Alexanders cannot establish a prima facie case of discrimination because, based on their "abysmal credit," the Alexanders were not qualified to rent Apartment No. 2 in the Rigas' Darlington Road property. (Defendants' Motion for Summary Judgment, p. 2). In support of this assertion, the Rigas maintain that they always require both spouses to be signatories on their leases, and that they typically do credit checks on both the husband and wife. With respect to the fact that a credit check was performed only on Mrs. Sinha in connection with the rental of Apartment No. 2 to Dr. and Mrs. Sinha, the Rigas contend that the Alexanders would not have qualified for the apartment regardless of whether a credit check had been done on both Mr. and Mrs. Alexander or only one of them because they both have a history of poor credit.

After consideration, the court concludes that material issues of fact preclude a judgment in the Rigas' favor as a matter of law based on the Alexanders' alleged failure to

establish a prima facie case of discrimination.[17] Specifically, factual disputes exist regarding the Rigas' claim that they always required credit checks to qualify prospective tenants. As noted in the recitation of the undisputed facts, in response to the Alexanders' discovery requests, the Rigas failed to produce any evidence to show that credit checks had been performed on any tenant in the Rigas' Darlington Road property, other than Mrs. Sinha. Under the circumstances, the Rigas' motion for summary judgment as to the Alexanders' discrimination claims will be denied.[18]

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17. For purposes of defendants' summary judgment motion, the court will assume that the prima facie case urged by the Rigas accurately sets forth the prima facie case applicable to the facts of this case. However, because the Alexanders were never even given the opportunity to view Apartment No. 2 in the Rigas' Darlington Road property, let alone submit a rental application for the apartment, the court is not convinced that the Rigas have accurately set forth the prima facie case applicable in this situation. *See McDonnell Douglas*, 411 U.S. 792, 802 n. 13 (1973) (The facts necessarily will vary, and the specification of the prima facie proof required from respondent in this Title VII case is not necessarily applicable in every respect to differing factual situations).

18. One further point should be addressed in connection with the Rigas' motion for summary judgment on the Alexanders' Fair Housing Act claim. Section 3604(d) of the Fair Housing Act specifically makes it unlawful to represent to any person because of race that any dwelling is not available for inspection or rental when such dwelling is, in fact, so available, and the Alexanders have asserted a claim against the Rigas under this section. Section 3604(d) has been held by the United States Supreme Court to give standing to sue to "testers," who may have approached a real estate agent fully expecting to receive false information and without any intention

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Appendix D

V

Next, the Rigas seek a judgment in their favor with respect to the claim of the Fair Housing Partnership under the Fair Housing Act. The Rigas maintain that the Fair Housing Partnership lacks standing to sue in this case because it has failed to allege a sufficient injury in fact. After consideration, the court does not agree.

With respect to its injury in this case, in the amended complaint, the Fair Housing Partnership alleges the following facts:

* * *

> 18. The [Fair Housing Partnership] has suffered a concrete and demonstrable injury to its interests in securing fair housing, and has suffered a diversion of its resources in order to investigate and redress discriminatory housing practices set forth in the instant Complaint, in that said previously-averred acts of housing discrimination to the individual Plaintiffs added to the existing workload of the [Fair Housing] Partnership, and caused the [Fair Housing] Partnership to divert

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of buying or renting a home. *Havens Realty Corp. v. Coleman*, 455 U.S. 373, 374 (1981). Based on the United States Supreme Court's decision in *Havens*, the court concludes that the Alexanders' credit history has no bearing on their claim under Section 3604(d) that the Rigas are liable for misrepresentation in connection with the availability of Apartment No. 2 in the Darlington Road property.

its resources and incur administrative costs, expenses and overhead in redressing said individual Complaints.

19. The [Fair Housing Partnership] has suffered further concrete injury to its interest in that it has been denied truthful and accurate information from Defendants as to availability of housing, and has suffered a diversion of its resources and out-of-pocket costs in efforts to obtain redress for the individual Plaintiffs.

* * *

(Amended Complaint, pp. 8-9).[19]

The Rigas rely on the decision of the United States Court of Appeals for the District of Columbia Circuit in *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C.Cir.1994) in support of their motion for summary judgment as to the claim asserted by the Fair Housing Partnership under the Fair Housing Act.

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19. In support of its allegations in the amended complaint and in opposition to the Rigas' motion for summary judgment, the Fair Housing Partnership submitted the affidavit of Andrea Blinn, its Executive Director. Ms. Blinn describes, *inter alia*, the mission of the Fair Housing Partnership and the methods by which it carries out its mission. Ms. Blinn then sets forth the costs incurred to investigate the Alexanders' discrimination complaint, which includes $1,200.00 for Ms. Blinn's services, $350.00 for Michele Gittleman's services and $175.00 in testing expenses. (Brief in Opposition, Exh. 1).

Appendix D

In *BMC Marketing*, a fair employment organization and two of its black testers brought suit alleging that an employment agency violated 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, when it denied referrals to black testers, while white testers with comparable credentials received referrals. The district court denied the employment agency's motion to dismiss the complaint for want of standing, and an interlocutory appeal was permitted. The District of Columbia Circuit held, *inter alia*, that the fair employment organization had Article III standing. However, in reaching its conclusion as to the fair employment organization's standing, the District of Columbia Circuit stated that it explicitly rejected the fair employment organization's suggestion that the mere expense of testing the employment agency constituted "injury in fact" fairly traceable to the employment agency's conduct. Although the diversion of resources to testing might well harm the fair employment organization's other programs, the District of Columbia Circuit stated that it was a self-inflicted harm which did not result from the employment agency's actions. Rather, it resulted from the fair employment organization's own budgetary choices.[20]

Although the Third Circuit has not considered the issue of whether a fair housing organization has standing to sue in

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20. The statement of the District of Columbia Circuit in *BMC Marketing* with respect to the standing of an advocacy group to file suit based solely on its diversion of resources to investigate alleged discrimination was followed by the district courts in *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 1997 U.S.Dist.Lexis 27 (E.D.Pa.1997), and *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 1997 U.S.Dist.Lexis 596 (E.D.Pa.1997).

circumstances where the only injury claimed by the organization is a diversion of its resources, other circuits that have considered the issue have concluded that standing exists. *See, e.g., Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir.1993) (fair housing organization had standing to sue where it established that its activities relating to identifying and counteracting the defendants' advertising practices diverted the attention of its staff members from their regular tasks); *Hooker v. Weathers*, 990 F.2d 913 (6th Cir.1993) (organization that worked to eliminate discriminatory housing practices had standing to sue trailer park, its manager and unnamed co-owner of park for discrimination on basis of familial status in violation of Fair Housing Act where organization devoted resources to investigate defendants' practices and alleged that it had confirmed that defendants discriminated on the basis of familial status); *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir.1992), *cert. denied*, 508 U.S. 972, 113 S.Ct. 2961, 125 L.Ed.2d 662 (1993) (nonprofit corporation that served as fair housing agency had standing to bring action based on alleged racial steering on part of real estate sales agents, since, by conducting investigation into activities of real estate agency, corporation deflected its time and money from counseling to legal efforts directed against discrimination); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir.1990) (only injury which need be shown to confer standing on fair housing agency to bring housing discrimination action is deflection of agency's time and money from counseling to legal efforts directed against discrimination).[21]

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21. Several district courts that have considered the issue of standing when an advocacy group's only injury is a diversion of

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Appendix D

The court is persuaded by the decisions of the Second, Sixth and Seventh Circuits, as well as the district court cases noted in footnote 21, that the Fair Housing Partnership has standing to sue the Rigas in this case based solely on its diversion of resources to investigate the Alexanders' claim of housing discrimination. The court reaches this conclusion despite the fact that Mr. Alexander had obtained evidence of discrimination by Mrs. Rigas before the testers from the Fair Housing Partnership became involved in the matter on his behalf,[22] and despite the fact that this case is limited to

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resources have also reached a conclusion that is contrary to the District of Columbia Circuit's statement in *BMC Marketing. See Louisiana Acorn Fair Housing v. Quarter Housing*, 952 F.Supp. 352 (E.D.La.1997) (nonprofit corporation which acted as fair housing agency had standing to bring federal civil rights action against timeshare resort which had allegedly discriminated against members of identifiable groups, in which agency sought damages based on its staff time, volunteer time, and other costs it had expended in efforts which were thwarted by resort and its owners); *Gaskin v. Commonwealth of Pennsylvania*, 1995 WL 154801 (E.D.Pa.1995) (where a defendant's violations of the law cause a non-profit advocacy organization to use its own resources to remedy the violation, the organization suffers an injury in fact); *Pumphrey v. Stephen Homes, Inc.*, 1994 WL 150947 (D.Md. 1994), *aff'd in part and rev'd in part*, (4th Cir. 1997) (fair housing organization had standing to sue where it devoted significant time and resources by sending out testers to confirm a pattern of discrimination, thereby diverting essential funds from its other activities).

22. As noted in the undisputed facts, prior to the testers being asked by the Fair Housing Partnership to contact Mrs. Rigas about the availability of the apartment in the Darlington Road property,
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an apparent isolated incident of discrimination by the Rigas.[23] However, it should be noted that a diversion of its resources is not the only basis for the Fair Housing Partnership's claim against the Rigas under the Fair Housing Act in this case. The Fair Housing Partnership also alleges that the Rigas violated its right to truthful and accurate information regarding the availability of Apartment No. 2 in their Darlington Road property based on the information provided by Mrs. Riga to its black tester, Daria Mitchell.[24] If

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Mr. Alexander asked his friend, Robin McDonough, a white female, to call Mrs. Rigas about the apartment. Contrary to the information provided to the Alexanders by Mrs. Rigas, Ms. McDonough was told that the apartment was available, indicating possible discrimination.

23. The Rigas attempted to distinguish several of the cases relied upon by the Fair Housing Partnership in support of its position that a diversion of resources is sufficient to establish standing on the part of a fair housing organization by noting that the discrimination in those cases was more widespread than the alleged discrimination in this case, involving either racial steering or discriminatory advertising practices. However, the court can find no support for such a distinction. In both situations, resources are diverted. The only difference is the extent of the diversion.

24. As noted in the Testing Summary completed by Ms. Blinn, which was submitted by the Rigas in support of their motion for summary judgment, Mrs. Rigas told Ms. Mitchell on September 30, 1995 that she was going to rent Apartment No. 2 in the Darlington Road property to "Jeff," and that she would call Ms. Mitchell if an apartment become available. Despite the apparent failure of "Jeff" to rent Apartment No. 2, there is no indication that Mrs. Rigas ever attempted to contact Ms. Mitchell to inform her of its availability. (Motion for Summary Judgment, Exh. O).

established, this action violates Section 3604(d) of the Fair Housing Act. Under the circumstances, the motion of the Rigas for a judgment in their favor as to the claim asserted by the Fair Housing Partnership under the Fair Housing Act will be denied.

An order follows.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-49

RONALD ALEXANDER, FAYE ALEXANDER
and the FAIR HOUSING PARTNERSHIP
OF GREATER PITTSBURGH, INC.,

Plaintiffs,

vs.

JOSEPH RIGA and MARIA A. RIGA,
a/k/a CARLA AGNOTTI,

Defendants

ORDER

AND NOW, this 10th day of March, 1998, in accordance with the foregoing memorandum, it is ORDERED that the motion of defendants, Joseph Riga and Maria A. Riga, for summary judgment pursuant to Fed.R.Civ.P. 56 be, and hereby is, denied.

s/ William L. Standish
William L. Standish
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 19, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-3597 and 98-3622

RONALD ALEXANDER; FAYE ALEXANDER;
FAIR HOUSING PARTNERSHIP OF
GREATER PITTSBURGH, INC.,

Appellants in No. 98-3597

v.

JOSEPH RIGA; MARIA A. RIGA
a/k/a Carla Agnotti

RONALD ALEXANDER; FAYE ALEXANDER;
FAIR HOUSING PARTNERSHIP OF
GREATER PITTSBURGH, INC.,

v.

JOSEPH RIGA; MARIA A. RIGA
a/k/a Carla Agnotti

Appellants in No. 98-3622

Appendix E

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, GREENBERG, SCIRICA
ALITO, ROTH, MCKEE, RENDELL and BARRY
Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellees/cross-appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Chief Judge Becker would have granted rehearing.

BY THE COURT,

s/ Carol Los Mansmann
Circuit Judge